
Hazardous Games Without Borders

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Summary

In Croatia the domain of media has become a genuine battlefield between individuals and organizations committed to the broadening of the freedom of thought and expression and individuals and the Government attempting to limit this freedom. The author describes the features of Croatian legislation regulating media. Most recent legal reforms — the new Law on Public Information and the amended Penal Code — have created a certain duality of liberal and repressive legal provisions. This legal situation has resulted in a great number of civil and criminal lawsuits against publishers and journalists, which seriously jeopardize freedom of the press.

In the last few years, since the creation of the independent Croatian state, the freedom of the media has surely been one of the topics provoking the stormiest and the most impassioned public debates, frequently from radically opposing and even irreconcilable positions. It is no wonder then, that these debates have resounded on the international scene as well, and that a day has not passed without the international community (foreign governments, NGOs, institutions and eminent individuals) warning the Croatian government against the instances of blatant violations of freedom of expression — guaranteed by the international conventions and declarations (ratified by Croatia, by the way) and the democratic “positive practices” — and its attitude towards the media and the journalists, totally blown out of all proportion.

In a word, this has been — regarding the freedom of the media — a period of “great turmoil” and numerous scandals:

- the privatisation (the case of *Slobodna Dalmacija*);
- the taxes (turnover tax on goods, popularly nicknamed pulp fiction and porn tax, imposed on the *Feral Tribune*);
- the custom-tax (the case of the *Novi list* and the *Glas Istre*);
- the sanitary rules violations (the case of the *Panorama*);
- the concessions (the case of *Radio 101* and others);
- propaganda/censorship (the case of HTV);

- numerous trials (criminal proceedings against journalists and civil lawsuits against publishers).

A more thorough review of “the media battlefield” would require a treatise on the “wartime context” and the role of journalists in, it and a detailed account of “the privatisation” in the former “socially-owned” newspaper publishing houses, the uncalled preservation of the HRT monopoly at the national level, layoffs of many journalists motivated not by the professional but by ethnic or political reasons, declaring some journalists “traitors and public enemies” by the leading government figures, anonymous threats to journalists and their families, the existence of “black lists” of the politically reproachable journalists and public figures in some media, assaults on journalists, the police summoning journalists to informative talks, editorial censorship and self-censorship, the instances of the violation of the journalistic codex and the phenomenon of “voluntary service” of some journalists, even at the price of “lying to the public”, the role of the Croatian Journalists’ Association and the trade union, and so on — and so on.

However, this would not only go beyond the intent of this short review of the Croatian media scene but would also be unnecessary, since the well-informed Croatian and international public is already familiar with this.

Nevertheless, it must be pointed out that underlying the everyday “sound and the fury” of politics, there have been some more sophisticated legal developments, which the public turned a blind eye to, but which will undoubtedly have major (both positive and negative) implications for the Croatian journalists, their work and freedom of expression.

Namely, Croatia has of its own free will agreed to recognise and respect all European democratic standards (including those concerning the media and the freedom of thought and expression) and set as its goal joining all European and international integrations. Naturally, this means it has had to adapt its legal system to the achievement of that goal. The Croatian Journalists’ Association has put in much effort to ensure that the laws concerning the media and journalists should include the guarantees (and mechanisms) of freedom of expression, in line with those in other European democratic states. Unfortunately, only with partial success.

In September of 1996, the Croatian National Parliament (Sabor), adopted the new Law on Public Information. The Law was prepared in co-operation with the Croatian Journalists’ Association and a group of legal experts of the Council of Europe. The result of this co-operation is a genuinely liberal law, guaranteeing freedom of expression similar to that in the states with a much longer democratic tradition. The Croatian journalists may be completely (with several minor objections) satisfied with its tenor. It is important to note, however, that this Law (regulating the so called civil/legal liability of the *publishers* in cases of the violation of pri-

vacy, dignity, reputation and honour as well as the compensation for non-material damages due to the inflicted mental pain and fear) was adopted on the eve of Croatia's admittance into the Council of Europe and under numerous pressures on the Croatian government. Such circumstances explain co-operativeness of the Government and the rather broad-minded import of the Law.

However, as soon as September 1997, in the politically changed circumstances (after Croatia had become a fully-fledged member of the Council of Europe, on the condition it ratifies the European Convention for the Protection of Human Rights and Fundamental Freedoms by the end of 1997) a step back was made. Within the comprehensive reform of penal legislation, the new Penal Code was adopted (effective as of 1 January 1998) whose provisions regarding *journalists* and their criminal liability for insult and defamation (harming someone's reputation or honour by the published information) and the violation of privacy, undoubtedly represent a decline compared to the stipulations built into the Law on Public Information. Regarding freedom of expression, this Penal Code does not even represent a momentous shift in relation to the communist times; as a matter of fact, it contains several significantly regressive provisions. Most *bona fide* and argued proposals and amendments by the Croatian Journalists' Association concerning the text of the Draft of the Law, were flatly turned down by the government!

That is why two opposing legal concepts "cohabit" in the Croatian legal system, the situation which may have not only paradoxal but absurd consequences. Because of the same information, a publisher may be acquitted of the liability for the damage while, in a criminal proceedings, the journalist-author of the information may be found guilty of defamation, insult, disclosing private or family situation, or implicating in criminal offence, and consequently punished (fined or imprisoned up to six months or one year).

The cynics would say that the authors of these two laws were more concerned about money (publishers') than the people (journalists)!? The message of the legislator is more than clear: scare (preventively) the journalists and (consequently) the newspapers will be tamer.

The new Penal Code contains, for instance, without any significant modifications, the same provision (contained in the old Penal Code) about the criminal offence of spreading false and disturbing rumours, according to which persons who promulgate, circulate and disseminate rumours for which they know are false, with the aim to alarm a number of citizens (the term "a number of" is defined in the Penal Code as minimally two people or more), provided the alarm has been caused, may be imprisoned or fined. In order to be able to fully comprehend the significance of this criminal offence we should say that so far it used to serve as a means of

prosecution of those who publicise facts and opinions unpalatable for the ruling authorities.¹

The new Penal Code retained the special “regime” for the protection of the reputation and honour of the five topmost state officials (president of the republic, president of the Croatian National *Sabor*, prime minister, president of the Constitutional Court, and president of the Supreme Court) which was introduced within the so called “mini penal reform” in April of 1996, despite fierce but futile resistance of the journalists. In case of insult or defamation of any of these “magnificent five”, the prosecution shall be undertaken by public attorney, in the line of duty (*ex offio*), while all other citizens must do this at their own expense, via a private lawsuit.²

Such restrictive provisions of the Penal Code have been justified by similar or identical stipulations in penal codes of other, undoubtedly democratic states. However, these are totally implausible arguments which can deceive only the ignorant. Truly, similar provisions may be found in the penal codes of certain democratic states, but they are sometimes more than a hundred years old, and are today only dead legal norms, long time ago made obsolete by the legal practice. Thus, if there was a desire to take the “democratic world” as a model, the existing practice (of constitutional and other courts and especially the European Court) — and not dead norms — should have served for that purpose. Apart from Turkey, nowhere in Europe are journalists threatened with prison. In Croatia (like in some other newly-created East European states) this is unfortunately not the case — at present there are tens of lawsuits against the journalists going on.³

¹Ivo Pukanić, editor-in-chief of the *Nacional*, has been taken to court on this ground, because of the information about the alleged unsafety of the Dubrovnik airport, following the crash of the American military plane and the death of Ron Brown and thirty-four people. The case is still pending.

On the charges of spreading false rumours, the Public Attorney’s Office initiated the pre-trial investigation against Ivan Zvonimir Ćirić and Dobroslav Paraga because of the information about the alleged participation of President Tudjman in the “division of Bosnia”, and against Viktor Ivančević because of the text “In his country”. However, the charges against them have not been brought yet; it seems that Public Attorney has changed his mind.

²Under this provisions, there is only one criminal proceedings going on in Croatia at the moment — against Viktor Ivančević (editor-in-chief of the *Feral Tribune*) and Marinko Ćulić (a *Feral Tribune* journalist); they are charged with insult and defamation of the President. After Marin Mršela, a Municipal Court judge acquitted them in September of 1996, Municipal Public Attorney Office appealed. The Zagreb County Court endorsed the appeal, annulled the first-instance verdict and returned the case to the first-instance court for re-trial. The proceedings (with the same judge) was resumed (so far there have been two hearings — the last on 22 December 1997). The judge, following the instructions of the County Court for establishing the relevant facts, decided to demand — via the Ministry of Justice — from its Spanish counterpart an explanation about Francisco Franco’s political doctrine and practice.

³There is almost no editor-in-chief of an independent newspaper who has not been taken to court because of insult or defamation. Most often: Davor Butković, the former editor-in-

To make things more amusing, in December of 1997, Croatia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the related protocols, which means that it has recognised the ultimate jurisdiction of the European Court for Human Rights in Strasbourg which has, with its rulings and the corresponding argumentation set very high standards in the protection of the freedom of thought and expression, guaranteed by Article 10 of the European Convention.

Namely, the practice of the European Court confirms the extreme importance attached to freedom of expression, even in relation to other human rights and freedoms. The freedom of expression is not only a fundamental human (personal, individual), but also a fundamental civil (political) right and as such, a pre-requirement for the survival of all democratic political systems, as well as a guarantee for the realisation of all other human rights and freedoms.⁴ Thus, freedom of expression is the rule, and any restriction of it (aimed at protecting some other constitutionally guaranteed personal rights, e. g. privacy, dignity, reputation and honour) but a possible exception to the rule. In the case of their crossing swords, freedom of expression, a principle nonpareil, is paramount and its protection takes precedence. The European Court has explicitly claimed that “the Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”⁵ Each eventual infringement (aimed at protecting some other value), in order to be allowed and justified, must be not only “useful”, “reasonable” or “desirable”

chief of the *Globus*, Viktor Ivančević, editor-in-chief of the *Feral Tribune* and Ivo Pukanić, editor-in-chief of the *Nacional*. Butković was sued by the entire Cabinet — Prime Minister and twenty-two ministers — for the alleged defamation (corruption) contained in the retold report of an eminent foreign consulting firm about the investment risks in Croatia. The Ministry of Defence has sued him because of the information that Ivica Rajić — accused for war crimes — allegedly for some time stayed at the military hotel owned by the same Ministry. The ruling party, HDZ, sued him for saying that allegedly there are the so called “black lists” of undesirable public figures. Ivančević is embroiled in numerous lawsuits, among which are the alleged insult of the President in one satirical photomontage and the alleged defamation of the President due to his comparison to Generalissimo Franco (both initiated by the Public Attorney Office), and the lawsuit initiated by Nevenka Tudić due to a satirical photomontage about “Sutjeska”. Pukanić is the defendant in many lawsuits initiated by politicians.

⁴In the case of *Handyside v. The UK* (verdict of 7 December 1976), the European Court pointed out: “The freedom of expression constitutes one of the essential foundation of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regard as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are demands of that pluralism, tolerance and broadmindedness without which there is no democratic society”, *Series A*, no. 24.

⁵*The Sunday Times v. UK (II)*, of 26 November 1991, *Series A*, no. 217.

but also “necessary in a democratic society”.⁶ Otherwise, the exceptions could — with their significance, scope and number — not only jeopardise but abolish the principle of freedom of expression.

It is almost unbelievable that the Law on Public Informing and the Penal Code are expressions of the same political (legislative) will. How to explain this paradox?

There are two possible explanations: either it is the question of political pragmatism of the Machiavellian type, or of ignorance and imprudence underpinned with “noble” intentions.

In the first case, the rationale goes like this: adopt a restrictive penal code (and after several — even probationary — sentences) intimidate the “over-critical” journalists and “oppositionists”. If, one day, the sentences are repealed by the European Court, by that time several years will have elapsed, during which the “freezing effect” on freedom of expression will have been achieved.⁷

In the second case this simply represents a “benevolent” unfamiliarity with the recent judiciary and legal practice of democratic countries and the misunderstanding of the role of the media in contemporary democracies. In the opinion of these people, the newspapers “mainly lie, slander and defame”. And top it all with sensationalist headlines! Most pitifully, such attitudes are advocated (in front of the millions of TV viewers) by some eminent university professors, who use excesses to prove their point. There have been excesses, it is true, but they are not the rule by any means. It is interesting that such claims are mostly based on “denials” which are not corroborated by court decisions. However, this does not prevent these people to pronounce the journalists and newspapers in question guilty before the trial, while their “favourites” have to be presumed innocent until proven guilty in court!

For example, one eminent professor (of law) publicly (in front of TV cameras) declared that journalists ought to be held legally liable if they write (nota bene) *the truth* “but with a negative connotation”, e.g. that “someone was seen wandering along the corridors of the Council of Europe”!? Undoubtedly, the judges of the European Court would be “wondered” with such a “wandering” ruling.

⁶*European Court judgements: The Observer and Guardian v. the UK*, of 26 November 1991, *Series A.*, no. 216; *The Sunday Times v. UK (II)*, of 26 November 1991, *Series A.*, no. 217.

⁷Namely, people may appeal to the European Court only after they have made use of all legal remedies in their own country. Since our courts are swamped with work and very slow, this can take several years. If we add to this two or three years needed by the European Court to reach its decision, it means that justice might be done after the lapse of at least two average mandates!? A tempting hazard for political gamblers, all the more since their bill will be footed by somebody else — the Croatian taxpayers.

Another eminent professor (of communicology and also in front of TV cameras) said: “Imagine writing that somebody is a hazarder! Outrageous!”⁸ The European Court would be, we are sure, equally “astonished” by the “hazardous” ruling.

Undoubtedly, these and similar attitudes of distinguished experts, irrelevant of their good intentions, are abused by the people “in power” for their pragmatic personal and group interests and benefits.⁹

So, it should not come as a surprise that Croatia is at the top (perhaps at the very top) of the list of European countries in the number of (civil) lawsuits against publishers¹⁰ and (criminal) lawsuits against jour-

⁸I sincerely hope that the eminent professor did not read a recent large headline in the *Novi list*: “It’s a hazard talking to the workers”. How would the distinguished professor be flabbergasted if he knew that an Austrian journalist (Oberschlick) called one of the right-wing politicians (Jörg Heider) “an idiot” because of some of his statements on the topic of “reconciliation”? An Austrian Court symbolically fined him with several hundred (not thousand) kunas, while the European Court has acquitted him, which cost the Austrian state a few tens of thousand German marks! (*Oberschlick v. Austria*, verdict of 1 July 1997). This means that you can call somebody an idiot if there was a good reason to do so. Freedom of expression is a universal human right and does not allow for national distinctions, even of the hazardous type — namely, what is valid for Austria is valid for Croatia, too.

⁹The proof of the tragicomic extent of the misapprehension between the Croatian and the foreign (for example, American) understanding of the freedom of speech is the notorious letter (a manifesto of the “blessed ignorance about the subject”) by the Croatian Prime Minister Zlatko Mateša, sent to the University in Valparaiso, USA, in which he “settled scores” with Ivan Zvonimir Ćirić and his “malicious and unconstructive criticism” of the government.

In order to illustrate the irreconcilability of Mateša’s assumptions and those of the American university people, suffice is to quote the ruling of the US Supreme Court from the celebrated case *N.Y. Times v. Sullivan* (1964), the precedent which established the rule that public officials may succeed with their lawsuit against the media only if they prove not only the factual unfoundedness but the actual malice as well: “Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. Such wide-open debate inevitably will result in false erroneous expression, but even that kind of speech or press must be protected if the freedom of expressions are to have the “breathing space” they need to survive. Therefore, any rule that compels a critic of officials’ conduct to guarantee the truth of all factual assertions — and to do so on pain of libel judgements virtually unlimited in amount — leads to self-censorship. Such censorship is inconsistent with the First Amendment.” William. E. Francois: *Mass Media Law and Regulation*, Macmillan Publishing Company, New York, Collier Macmillan Publishers, London, 1986, p. 121.

¹⁰In Croatia there are several hundred lawsuits against publishers for harm caused by the so called mental pain, in which the damages amount to a total of several tens of million of German marks! More than 90% of these charges were brought by the so called public figures, mostly politicians or people “with close ties with those in power”. There have been only a few cases in which journalists sued other newspapers or journalists (e.g. Ivanković sued the *Globus* and the *Nacional*, Jović and Mikulandra sued the *Feral Tribune*). To our knowledge, only one journalist sued a politician (Jasna Babić) against Vladimir Ćeks, and a settlement was reached outside court after [Ćeks had apologised]. Individual damages range from \$15,000 to several million dollars. The

nalists. The litigious trend is not on the wane; on the contrary, it is on the increase. Due to the high cost of legal fees, this seriously jeopardises the survival of the newspapers and the publishers on the market (particularly smaller ones), not to mention the vexation it causes to editors and journalists (losing time and nerves), being summoned by the police for “informative talks”, having to make numerous court appearances either as defendants or witnesses. Even if eventually these indictments (before a Croatian or the European court) prove untenable, their ruinous financial and “freezing” effects will have been achieved.

However, there remains a hope that most Croatian journalists are not going to renounce without a fight the considerable elbow-room for freedom which they have already won, though frequently paying for it too high a price, and that they will not allow the new false prophets to drag us back to the old and much too familiar wasteland.¹¹

biggest claims are by: “Croatialine” against the *Novi list* (\$5,000,000); one private businessman against the “Arena” (\$3,000,000); 23 cabinet members against the *Globus* (\$800,000); and Nevenka Tulman against the *Feral Tribune* (\$750,000).

Taking into account a very small number of legally binding verdicts, it is very difficult to speak even of the outlines of some sort of legal practice. Some verdicts fix the range of non-material damage from 30,000 to 350,000 kunas. For our economic situation I think these are excessively high damages. That is why I find such lawsuits the biggest danger for the media freedom in Croatia in the coming years.

¹¹As the famous American judge Learned Hand once said: “Liberty lies in the hearts of men and women; and when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help.”, Ronald Dworkin, *Freedom’s Law — The Moral Reading of the American Constitution*, Harvard University Press, Cambridge, Massachusetts, 1996, p. 342.